

# Audit Report



## IMMIGRATION AND NATURALIZATION SERVICE INSTITUTIONAL REMOVAL PROGRAM

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## **IMMIGRATION AND NATURALIZATION SERVICE INSTITUTIONAL REMOVAL PROGRAM**

### **EXECUTIVE SUMMARY**

The Institutional Removal Program (IRP) is a national program that aims to (1) identify removable criminal aliens in federal, state, and local correctional facilities, (2) ensure that they are not released into the community, and (3) remove them from the United States upon completion of their sentences. Aliens convicted of certain offenses or unlawfully present in the United States are subject to deportation. The IRP process ideally begins with the identification of potentially deportable foreign-born inmates as they enter the correctional system and culminates in a hearing before an immigration judge at a designated hearing site within the federal, state, or local prison system. Upon completion of their sentences, deportable aliens are then released into INS custody for immediate removal. The IRP is a cooperative effort of the Immigration and Naturalization Service (INS), the Executive Office for Immigration Review (EOIR), and participating federal, state, and local correctional agencies. According to INS statistics, of the 71,063 criminal aliens the INS removed in FY 2001, 30,002 were removed via the IRP.

Our audit focused primarily on the IRP process at the state and local level because of the inherent difficulties faced by the INS in coordinating with non-federal agencies. We assessed whether the INS: (1) effectively managed the IRP and, in particular, how well the INS handled the impact of legislative changes enacted in 1996 on the IRP workload; (2) identified all foreign-born inmates in state or local custody; and whether deportable criminal aliens not identified by the INS went on to commit other crimes after being released from incarceration; and (3) incurred detention costs due to failures in the IRP process and the causes underlying those failures. To achieve these objectives, we reviewed applicable laws, regulations, manuals, and memoranda; interviewed INS personnel responsible for the IRP; and tested the IRP process by examining a nationwide judgmentally selected sample of A-files of removable criminal aliens. We also observed and analyzed the IRP process in two states and in two counties within each of those states. We reviewed 545 judgmentally selected files of inmates identified as foreign-born by state or local officials at the California Department of Corrections (DOC), the Florida DOC, and local jail facilities in Fresno County, California; Kern County, California; Broward County, Florida; and Dade County, Florida.<sup>1</sup>

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<sup>1</sup> For the California DOC and the Florida DOC, we reviewed 172 and 196 inmate files, respectively. As for the counties, we reviewed 75 total foreign-born inmate files for California (Fresno and Kern counties) and 102 for Florida (Dade and Broward counties).

We found that the INS has not effectively managed the IRP. The INS has yet to determine the nationwide population of foreign-born inmates, particularly at the county level. Without this information, the INS cannot properly quantify the resources the IRP needs to fully identify and process all deportable inmates. Even if the INS were unable to fully fund the needs of the IRP, the INS should know the universe of foreign-born inmates to identify shortfalls in coverage and be able to assess the associated risks, which it currently is unable to do.

The INS has not been able to keep pace with the increases in the IRP workload resulting from sweeping changes in immigration law brought about by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 and the Anti-Terrorism and Effective Death Penalty Act of 1996. These laws expanded the definition of aggravated felony and eliminated relief for legal resident aliens convicted of aggravated felonies, dramatically increasing the number of criminal aliens eligible for removal, and thus the IRP workload. Despite the foreseeable impact of the legislation, we found little evidence to indicate that management had taken steps to address the increased workload, particularly at the county level. Indeed, the number of criminal aliens deported actually decreased in FY 2001, albeit slightly, from FY 2000 totals, even as the total prison population grew by 1.6 percent during the same period. Staffing levels for the IRP were not increased. In fact, staffing levels decreased because of INS-wide chronic vacancies in the immigration agent (IA) position, the backbone of the IRP.

Exacerbating the problems of stagnant resources, an increasing workload, and chronic vacancies in IRP positions, INS employees assigned to the IRP may be redirected, at district management's discretion, to any one of several competing priorities. We found that immigration agents assigned to the IRP were often detailed to assist with other program activities, such as employer sanctions, anti-smuggling, and fraud. While the reallocation of resources is not unique to the IRP, it is particularly crippling to IRP operations given the districts' difficulty in maintaining staffing levels.

We found IRP coverage (~~i.e.~~ interviews of foreign-born inmates to determine deportability) at the county level minimal to nonexistent. We observed this first hand at the county facilities we visited in California and Florida. INS officials acknowledged that the lack of coverage at the county level was widespread. Although state coverage in FY 1999 and FY 2000 was adequate, we found IRP coverage in California, which ranks first in the number of foreign-born inmates held in state custody, in decline in FY 2001. The INS failed to interview, and therefore identify, 19 percent of foreign-born inmates at state prison intake facilities throughout California in FY 2001. Initial figures for the first quarter of FY 2002 indicate that the coverage is worsening, resulting in backlogs of foreign-born inmates

requiring interviews. The declining coverage at the state prisons is due, in part, to the fact that California has done little to help the INS streamline the IRP process beyond the initial program enhancements implemented in 1995. As a result, INS agents must maintain an active presence at 11 intake facilities dispersed throughout the state over an area roughly 120,000 square miles in size. In contrast, Texas funnels all foreign-born inmates through one intake facility. Chronic vacancies in the INS immigration agent position have further exacerbated INS efforts in maintaining coverage of state facilities in California.

The whole IRP process is predicated on the cooperation of the institutions in which criminal aliens are incarcerated. Without that cooperation, the IRP cannot function effectively. Interestingly, states and counties throughout the country have received hundreds of millions in funding annually through the State Criminal Alien Assistance Program<sup>2</sup> (SCAAP), yet there are no provisions in the program requiring state and county recipients to cooperate with the INS in its removal efforts.

We found that the INS did not always timely process IRP cases, and as a result, has been forced to detain criminal aliens released from incarceration into INS custody to complete deportation proceedings. In order to determine the causes for IRP-related detention costs, we reviewed a judgmental sample of 151 A-files of criminal aliens in INS custody, which included criminal aliens released from federal, state, and local correctional facilities throughout the country. In addition, we interviewed INS officials at all levels, as well as officials at the EOIR, the General Accounting Office, and the Department of State. For our sample of 151 files, we identified a total of \$2.3 million in IRP-related detention costs, of which \$1.1 million was attributable to failures in the IRP process within the INS's control, and \$1.2 was related to factors beyond the INS's immediate control. Failures in the IRP process included (1) incomplete or inadequate casework; (2) untimely requests for travel documents; (3) failure to accommodate for delays in the hearing process; (4) failure to timely initiate and complete IRP casework; and (5) use of inappropriate removal procedures. Factors beyond the INS's control included (1) countries that, through design or incompetence, delay the issuance of travel documents; and (2) countries that refuse to take back their citizens. INS-wide, the detention costs associated with these breakdowns in the process may be significant. According to INS statistics, the average daily population for criminal aliens held in INS custody was over 10,000 in FY 2001, accounting for over half of the INS's available bed space. The INS indicated that the overwhelming majority of these criminal aliens

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<sup>2</sup> SCAAP is a Department of Justice grant program established to help state and local governments defray the cost of incarcerating criminal aliens. The Bureau of Justice Assistance (BJA) administers the program. According to BJA statistics, SCAAP funds for FY 2000 and FY 2001 totaled \$1.1 billion.

were federal, state, or local inmates that were released into INS custody for removal. Under ideal conditions, an effectively operating IRP would preclude the need for INS detention in such instances. Based on this unaudited data, total IRP-related detention costs could run as high as \$200 million annually.

To address the problems cited in the report, we recommend that the INS Commissioner take the following action:

- Determine (a) the total foreign-born inmate population at the county level, as well as the state and federal levels, (b) the resources required for the IRP to fully cover the population, and (c) the risks involved with not providing full coverage.
- Strengthen IRP program management by specifically accounting for program expenses and dedicating resources to the program.
- Request that the Office of Justice Programs change current SCAAP grant provisions to require, as a grant condition, the full cooperation of state and local governments in the INS's efforts to process and deport incarcerated criminal aliens.
- Fully develop plans currently under consideration for an expanded detention enforcement officer position to replace the vacancy-ridden immigration agent position.
- Develop clear, consistent, and standardized procedures for A-file documentation in the IRP process to enhance efficiency.
- Ensure that INS officers make use of streamlined procedures for removal as authorized under the 1996 Act to minimize detention costs.
- Develop and implement, in coordination with the Department of State, a Memorandum of Understanding outlining the role of liaisons between the INS and the Department of State. This should include the delineation of responsibilities with respect to the timely issuance of travel documents.

Our audit objectives, scope, and methodology appear in Appendix I. The details of our work are contained in the Findings and Recommendations section.

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# **IMMIGRATION AND NATURALIZATION SERVICE INSTITUTIONAL REMOVAL PROGRAM**

## **INTRODUCTION**

The mission of the Immigration and Naturalization Service (INS) includes the detection, apprehension, and removal of aliens unlawfully present in the United States, particularly those involved in criminal activity. The goal of the Institutional Removal Program (IRP) is to enhance the INS's efforts at identifying removable criminal aliens in federal, state, and local correctional facilities, and initiate deportation proceedings to effect their timely removal.

## **Background**

In 1988, the INS and the Executive Office for Immigration Review (EOIR) established the Institutional Removal Program, then known as the Institutional Hearing Program (IHP). Under the IRP, attorneys, immigration judges, and incarcerated aliens are brought together in a system that is designed to expedite the removal process. The program objectives are to complete the judicial and administrative review proceedings prior to completion of aliens' sentences, thereby eliminating the need for further detention by the INS. Based on the most current information available, the IRP operates at 13 hearing sites at Federal Bureau of Prisons (BOP) facilities; 83 state hearing sites at facilities in 49 states, the District of Columbia, and Puerto Rico; and 4 hearing sites at county facilities in California, Florida, and Massachusetts.

Removal proceedings for incarcerated criminal aliens processed through the IRP begin with the facilities' identification of foreign-born inmates upon their entry into federal, state or county incarceration. Generally, INS district offices are provided with periodic listings of foreign-born inmates from federal and state correctional institutions within their jurisdiction. Such reporting by federal correctional institutions is required; the INS depends on voluntary cooperation from state and local facilities. At the county level, INS district offices must proactively check local booking records of inmates identified as foreign-born for potentially deportable criminal aliens.

INS agents assigned to the IRP, usually immigration agents, conduct on-site interviews with inmates identified by the facility as foreign-born to determine their legal status and deportability. The agents also perform database checks, including but not limited to the INS's Deportable Alien

Control System<sup>3</sup> (DACS), the INS's Central Index System<sup>4</sup> (CIS), and the Federal Bureau of Investigation's National Crime Information Center (NCIC) database, and obtain copies of conviction records and other necessary information to support a removal order. Once an inmate is determined removable, the INS agent files a Notice to Appear (NTA), at which point the Executive Office for Immigration Review (EOIR) is brought into the process culminating in a deportation hearing before an immigration judge, ideally at a designated hearing site within the federal, state, or local prison system. Upon completion of their sentences, deportable aliens are then released into INS custody for immediate removal.

## **Selection of State and County Facilities**

Most of the nation's known foreign-born inmate population (about 80 percent according to INS statistics) is concentrated in seven states: California, New York, Texas, Florida, Arizona, New Jersey, and Washington. We selected California and Florida to perform our site work based on preliminary audit work indicating that coverage (i.e. interviews of foreign-born inmates to determine deportability) by the INS was not as comprehensive in these two states as it was in the other large states for geographic, demographic, and political reasons. As of June 30, 2001, California and Florida ranked first and fourth, respectively, in the number of foreign-born inmates held in state and federal custody, accounting for nearly half of the nation's known population of foreign-born inmates.

In order to assess the effectiveness of the IRP at the county level, we selected Fresno and Kern counties in California, and Broward and Dade counties in Florida for review. Fresno and Kern counties were selected because they are rural counties with intense alien involvement in the surrounding agricultural environment and are sufficiently removed from major INS district offices to make significant and sustained INS coverage difficult. Broward and Dade counties in Florida, conversely, were selected because they are large metropolitan areas with large foreign-born populations and INS offices in close proximity. Local correctional facilities, such as those in Broward, Dade, Fresno, and Kern counties, represent a potentially vast, but largely unknown element with regard to the size of the nation's incarcerated criminal alien population.

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<sup>3</sup> The DACS captures deportable alien data; tracks aliens who are arrested, detained, or formally removed from the country; produces deportation forms and reports; and makes the information accessible online to INS deportation officers and other INS users.

<sup>4</sup> The CIS is the INS's main automated information system, serving both the INS's INS benefits and law enforcement functions. The CIS contains data on lawful permanent residents, naturalized citizens, violators of immigration laws, aliens with Employment Authorization Document information, and others for whom the INS has opened files or in whom it has a special interest.



## Legislative History

Legislative efforts to provide for a more expeditious removal process for criminal aliens first appeared in the Immigration Reform and Control Act of 1986 (IRCA). Specifically, Section 242(i) of the IRCA provided that:

In the case of an alien who is convicted of an offense, which makes the alien subject to deportation, the Attorney General shall begin any deportation proceedings as expeditiously as possible after the date of the conviction.

The Anti-Drug Abuse Act of 1988 introduced the term “*aggravated felony*” into immigration law. Defined in Section 101(a) (43) of the Immigration and Nationality Act (INA), aggravated felonies were initially confined to crimes of violence and those involving illicit trafficking in controlled substances. The term and its legal implications had a profound impact on the INS’s workload and detention needs, as the INS was mandated to detain criminal aliens convicted of aggravated felonies from the time they come into INS custody until they receive final orders of removal.

The Immigration Act of 1990 (IMMACT 90), clearly defined the scope of INS responsibility to include criminal aliens at the local level under Section 242A (a), which states that:

The Attorney General shall provide for the availability of special deportation proceedings at certain federal, state and local correctional facilities for the aliens convicted of *aggravated felonies*...in a manner which eliminates the need for additional detention at any processing center of the INS in a manner which assures expeditious deportation, where warranted, following the end of the aliens incarceration for the underlying sentence.

The Immigration and Nationality Technical Correction Act of 1994 (INTCA) expanded the definition of aggravated felonies to include lesser crimes such as fraud, burglary, and theft. This trend continued with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA), both enacted in 1996, and both of which brought sweeping changes to the immigration laws. The enactment of the IIRIRA and the AEDPA dramatically expanded the definition of removable aliens, mostly involving criminal aliens serving time at the county level.

The definition of aggravated felony was expanded under the AEDPA to include such crimes as commercial bribery, counterfeiting, forgery, perjury and other crimes, while the IIRIRA expanded the definition of aggravated felonies still further by reducing the sentence threshold for certain crimes.

More significantly, the AEDPA eliminated relief for legal resident aliens who had been convicted of an aggravated felony, further expanding the pool of deportable criminal aliens.

In addition, the IIRIRA established streamlined procedures for the removal of certain classes of aliens without a formal hearing process: (1) administrative removal allowed the INS to remove criminal aliens convicted of specific classes of offenses without a hearing before an immigration judge; and (2) reinstatement of prior removal order eliminated all EOIR reviews for criminal aliens who were previously deported and subsequently convicted of a crime after re-entry. With these supplemental options, the deportation process now provides for removal without an immigration hearing as two of three possible options.<sup>5</sup> In recognition of the fact that the removal of criminal aliens was no longer predicated in all instances on a formal hearing process, as well as the fact that the short time served in county facilities was not conducive to on-site hearings, the name of the program was changed from the Institutional Hearing Program to the Institutional Removal Program.

## **Prior Reports**

The OIG previously reviewed IRP operations at the state level in its *Audit of INS Select Enforcement Activities*, Report No. 95-30, September 26, 1995. The report identified substantial backlogs in the number of foreign-born inmates in state prisons requiring interviews and processing. The California state IRP was identified as the most problematic of the state operations, accounting for over 60 percent of the total backlogs. In addition, the OIG identified over \$9 million in funds-to-better use related to detention costs incurred due to inefficiencies in the California state IRP operation. The INS, in response, implemented enhancements to the state IRP operations to ensure that all foreign-born inmates were identified and timely processed if determined to be removable.

The General Accounting Office (GAO) reviewed IRP operations in its audit of *Criminal Aliens: INS' Efforts to Remove Imprisoned Aliens Continue to Need Improvement*, Report No. GAO/GGD-99-3, October 1998. In addition, the GAO released testimonial Report No. GAO/T-GGD-99-47, February 25, 1999, *Criminal Aliens: INS's Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement*, and testimonial Report No. GAO/T-GGD-99-148, *Immigration and Naturalization INS: Overview of Management and Program Challenges*, July 29, 1999. The audit and subsequent testimonial reports highlighted the following areas of concern:

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<sup>5</sup> Generally, those qualifying for a removal hearing before an immigration judge include criminal aliens who are Legal Permanent Residents and illegal aliens convicted of an aggravated felony with a sentence of less than one year.

- The INS failed to identify all deportable criminal aliens including aggravated felons:

The GAO found that, at the state level, the INS failed to identify all aggravated felons. There were two reasons for the failure: (1) the backlogs of foreign-born inmates requiring interviews and processing, as previously reported by the OIG, had not been addressed; and (2) the INS had not allocated the sufficient resources to address the increasing numbers of foreign-born inmates entering the system.

- The INS did not complete the IRP process for about half of the criminal aliens before they were released by state facilities:

The GAO found that the INS's inability to fully process criminal aliens through the IRP resulted in additional detention costs, as reported in the prior OIG report.

- The INS needed a Workload Analysis Model and greater managerial direction in goal setting:

The GAO found that INS management had not taken the steps necessary to determine the level of resources required to adequately staff the IRP. Further, there was no systematic basis for determining performance results that could be accomplished with various resource levels. The GAO stated that the INS lacked specific operational goals and formal communication.

- High attrition undercut the IRP's effectiveness:

The GAO found that the loss of expertise due to high attrition rates in the IRP hampered the program's effectiveness.

## **FINDINGS AND RECOMMENDATIONS**

### **1. THE INS HAS NOT EFFECTIVELY MANAGED THE IRP**

While IRP coverage in Florida state prisons was adequate, the INS did not identify all foreign-born inmates in California state prisons, and the INS presence at county facilities in both California and Florida was inadequate. INS officials confirmed the lack of coverage at county facilities. This deficiency was based, in part, on the INS's failure to effectively manage the increases in IRP workload that resulted from sweeping changes brought about by the Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 1996. Despite the foreseeable impact of the changes in immigration law, IRP staffing levels have remained relatively static, and in effect have decreased because of chronic vacancies in IRP positions. As a result, many foreign-born inmates who are deportable aliens pass through county facilities virtually undetected. Based on our review of a sample of foreign-born inmates released from county facilities in June 1999, many inmates not identified by the INS as potentially deportable prior to release went on to commit other crimes in the community, including drug possession, spousal abuse, and child molestation. In addition, the INS has yet to fully assess the scope of the incarcerated criminal alien problem, particularly at the county level, and as such is unable to fully quantify IRP resource needs.

#### **Impact of the IIRIRA and the AEDPA on IRP Workload**

Changes in immigration law enacted in 1996 dramatically altered the IRP landscape. The overall effect of the legislation was to make eligible for deportation whole classes of aliens previously not deportable, most notably aliens with legal status serving time for lesser crimes at the county level. Two changes have increased the number of deportable aliens at the county level: (1) the legislation lowered the threshold for deportation for crimes of moral turpitude from actual sentences of one year or more, to crimes that have *potential* sentences of one year or more (i.e. actual sentences gave way to possible sentences), and (2) the definition of an aggravated felony was greatly expanded, while the sentencing minimum for some crimes was reduced from five years to one year, and the majority of crimes had no minimum. As a result, the county jails became a large source of potentially deportable candidates. Appendix III details how the parameters of deportation were expanded as a result of the IIRIRA.

According to the Bureau of Justice Statistics (BJS), as of June 30, 2001, approximately 630,000 incarcerated inmates were in local jails, representing one third of the nation's criminal population. It should be noted that this represents a snapshot in time and does not reflect the larger turnover in populations at the county level due to the relatively short sentences.

Officials at all levels, both in the INS and the EOIR indicated that the 1996 legislation had a profound effect on the IRP's workload. However, we found little evidence to indicate that management had taken steps to address the increased workload, particularly at the county level. Indeed, the number of criminal aliens deported actually decreased in FY 2001, albeit slightly, from FY 2000 totals, even as the total prison population grew by 1.6 percent during the same period.

We found that, to date, no INS-wide analysis has been performed to determine the nature and scope of the IRP's workload. While the INS performed a resource and staffing evaluation prior to 1996, the scope was limited, pertaining to one specific INS region. Another analysis, specific to one particular sub-office was conducted in 1999, but focused only on front-end processing, neglecting the downstream impact that an increased IRP output would have in other areas, such as district counsel and the Detention and Removal (D&R) division. In addition, both analyses focused only on state and federal facilities, leaving out the vast populations of potentially deportable foreign-born inmates passing through the nation's county jails. The INS has developed a workload model for IRP activities at the federal and state levels using BJS figures. However, applying the model at the county level has been problematic because the BJS provides "snapshot" figures that do not reflect the rapid turnover of inmate populations at the county level. In comparison, federal and state populations are fairly static.

### **Universe of Incarcerated Criminal Aliens Unknown**

INS management cannot make an informed assessment of the resources required for the IRP if it does not know the scope of the problem. While the INS does track foreign-born inmate populations at the federal and state level, it does not maintain INS-wide statistics on foreign-born inmate populations at the county level. Unlike measuring and predicting illegal immigration, with its inherent unknown factors, the population of criminal aliens in American prisons is both finite and determinable.

We attempted to quantify the impact of the 1996 legislation on IRP workload at the county level. We were unable to do so nationwide because of the dearth of information available at both the INS and the counties we reviewed. However, we did review foreign-born inmate files at select county

jails in order to evaluate the potential scope of IRP-related activities at the county level.

### **IRP Presence in Select County Facilities Minimal at Best**

Unlike at the federal and state levels where the INS has access to the institutions' databases or is provided listings of foreign-born inmates on a routine basis, the IRP at the county level requires on-site jail checks by INS agents to identify foreign-born inmates as they enter the system. We found that the INS was not making a consistent or comprehensive effort to check local jail booking records on a daily basis for deportable criminal aliens at the local facilities we reviewed in the counties of Fresno, California; Kern, California; Broward, Florida; and Dade, Florida. As part of the booking process, incoming inmates are usually asked to provide their country of birth. This is the INS's first source in identifying potentially deportable criminal aliens. INS officials conceded that IRP coverage at the county level is deficient and attributed the cause to an insufficient number of immigration agents available to provide coverage for the large number of foreign-born inmates who pass through the jails. On an annual basis, the population of foreign-born inmates at the counties we reviewed (excepting Broward) ranged from 6,408 to 43,920 inmates, as indicated by the average monthly intake shown in the table below.

<b>AVERAGE MONTHLY INTAKE OF FOREIGN-BORN CRIMINALS AT SELECT COUNTY FACILITIES</b>			
<b>County, State</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>
Fresno, CA	638	600	534
Kern, CA	579	639	742
Dade, FL	2,563	2,431	3,660
Broward, FL	Unknown	Unknown	Unknown

Source: Respective Sheriff's Departments

While we were able to obtain limited information from Broward County, neither the INS Miami district office nor Broward County officials could provide us with historical data on the foreign-born population in Broward County jails. However, INS officials in Miami believed the foreign-born population in Broward to be significant.

### **Recidivism of Foreign-Born Inmates at County Level**

The most immediate risk associated with breakdowns in the IRP process is that an unidentified deportable criminal alien will be released back

into the community and will commit further, possibly violent, crimes. In order to verify the occurrence and nature of recidivism among potential IRP candidates that the INS is not reaching, we reviewed a sample of files of inmates identified by the facilities as foreign-born released from the above-listed county facilities in June 1999. We selected June 1999 to allow adequate passage of time to test for recidivism. In nearly all instances, there was no evidence that the INS had interviewed the foreign-born inmates to determine their legal status prior to release.<sup>6</sup> As acknowledged by INS officials at the exit conference, this stems from the fact that the INS lacks a mechanism to track the interviews it performs and the related outcomes. We performed subsequent NCIC, DACS, and CIS database checks, but were unable to determine how many of the foreign-born inmates were deportable due to the lack of information available. Similarly, we were unable to verify if any of the foreign-born inmates were United States citizens.

### **Fresno County, California**

According to the Fresno County Sheriff's Department, a total of 724 foreign-born inmates were released from Fresno County facilities in June 1999. We reviewed documentation for 30 of the 724 and determined that the INS did not interview 29 of them. In addition, we found that at least 5 of the 30 foreign-born inmates committed aggravated felonies after their release in June 1999 and were re-arrested on a subsequent charge, as shown in the table below:

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<sup>6</sup> Local law enforcement has neither the training nor the access to INS databases to determine a foreign-born inmate's legal status. Further, while the terms of SCAAP grants require state and local officials to submit the names of inmates identified as foreign-born to the OJP for potential reimbursement of incarceration costs, they are not required to notify the INS.

<b>RECIDIVISM IN FRESNO COUNTY, CALIFORNIA</b>		
<b>Identified by County as Foreign-Born but not Interviewed by INS</b>	<b>Original Charge</b>	<b>Subsequent Charge</b>
Case 1	Manufacture of controlled substance	Possession of a controlled substance
Case 2	Battery resulting in serious injury	Possession of a controlled substance
Case 3	Corporal injury to spouse	Spousal abuse
Case 4	Possession for manufacture of a controlled substance	Drug conspiracy
Case 5	Sexual battery	Lewd & lascivious acts with a minor

Source: Fresno County Sheriff's Department & INS DACS and CIS databases.

### **Kern County, California**

According to the Kern County Sheriff's Department, a total of 505 foreign-born inmates were released from Kern County facilities in June 1999. We reviewed documentation for 45 of the 505 and determined that the INS failed to interview all 45 inmates, 26 of whom were arrested for subsequent crimes after their release. The subsequent crimes ranged from violation of probation, to the more serious offenses of spousal abuse, child abuse, and assault, as represented in the table below:



<b>RECIDIVISM IN KERN COUNTY, CALIFORNIA</b>		
<b>Identified by County as Foreign-Born but not Interviewed by INS</b>	<b>Original Charge</b>	<b>Subsequent Charge</b>
Case 1	Lewd & lascivious acts with a child under 14 years old	Continuous sexual abuse of a child under 14 years old
Case 2	Battery of a former spouse	Battery of a former spouse
Case 3	Possession of controlled substance	Possession of a controlled substance & trespassing
Case 4	Willful cruelty to a child	Willful cruelty to a child
Case 5	Inflict corporal injury to spouse	Spousal abuse
Case 6	Assault with a deadly weapon	Assault with a deadly weapon

Source: Kern County Sheriff's Department & INS Bakersfield Database

## **Dade County, Florida**

According to the Dade County Sheriff's Department, a total of 2,576 foreign-born inmates were released from Dade County facilities in June 1999. We reviewed documentation for 40 of the 2,576, but were unable to verify, due to lack of adequate records, whether the INS interviewed any of them. We did note that at least 8 went on to commit subsequent crimes after their release, as shown in the table below:

<b>RECIDIVISM IN DADE COUNTY, FLORIDA</b>		
<b>Identified by County as Foreign-Born but not Interviewed by INS</b>	<b>Original Charge</b>	<b>Subsequent Charge</b>
Case 1	Battery	Aggravated assault
Case 2	Grand theft	Grand theft (3 <sup>rd</sup> Degree)
Case 3	Possession of a controlled substance	Cocaine trafficking
Case 4	Grand theft	Battery
Case 5	Cocaine possession	Cocaine possession
Case 6	Burglary/theft	Burglary/theft
Case 7	Grand theft	Grand theft
Case 8	Marijuana possession	Battery/Possession of a controlled substance

Source: Dade County Sheriff's Department

### **Broward County, Florida**

According to the Broward County Sheriff's Department, a total of 629 foreign-born inmates were released from Broward County facilities in June 1999. We reviewed documentation for 62 of the 629. Neither the INS nor Broward County officials could verify whether any of the foreign-born inmates had been interviewed or identified by the INS as deportable criminal aliens. Because of the lack of information available, we were able to obtain criminal history for only 17 of the 62, 8 of whom we verified were re-arrested on subsequent charges, as shown in the table below:

<b>RECIDIVISM IN BROWARD COUNTY, FLORIDA</b>		
<b>Identified by County as Foreign-Born but not Interviewed by INS</b>	<b>Original Charge</b>	<b>Subsequent Charge</b>
Case 1	Loitering	Marijuana possession
Case 2	Fraud/Larceny	Fraud/Larceny
Case 3	Drug possession	Possession of drug paraphernalia
Case 4	Trespassing	Selling/Manufacturing a controlled substance
Case 5	Battery	Battery
Case 6	Possession of drug paraphernalia	Possession of drug paraphernalia
Case 7	Disorderly conduct	Possession of drug paraphernalia
Case 8	Cocaine distribution	Cocaine distribution

Source: Broward County Sheriff's Department

## **IRP Coverage Declining at State Prisons in California**

While coverage at the county level was the greatest challenge facing the IRP, there was also evidence that the coverage at state prisons in California, which ranks first in the number of foreign-born inmates in state custody, was in decline. During FY 1999 and FY 2000, INS coverage of state intake facilities was at nearly 100 percent (i.e. INS officers interviewed nearly all facility-identified foreign-born inmates as they entered the system). However, the California DOC provided statistics showing that in FY 2001, INS coverage at state intake facilities had fallen. According to the California DOC, the INS had failed to interview 2,464 (19 percent) of the 13,208 foreign-born inmates that entered the system in FY 2001.<sup>7</sup> Recent data indicates that coverage at the state intake facilities has continued to drop. Through December 2001, the INS failed to interview 1,364 (45 percent) of the 3,015 foreign-born inmates at the state intake facilities. The

<sup>7</sup> While INS officials did not attribute a specific cause for the significant drop in coverage, we believe the reasons to be a combination of logistics, chronic vacancies, and diversion of IRP resources.

trend appears to be continuing, as we learned that an INS sub-office recently informed the California DOC that it did not have enough immigration agents to cover the 80-to-100 foreign-born inmates received daily at a key intake site. Instead, the INS office has had to prioritize interviews based on the earliest release date of the inmates. If the trend at the California state level is not reversed, the INS will soon be faced with significant backlogs of unidentified foreign-born inmates, reminiscent of those identified in the prior OIG report. Criminal aliens not identified as deportable by the INS will, in all probability, be released back into the community upon completion of their sentences.

### **Workload versus Resources**

INS officials at the Fresno and Bakersfield sub-offices stated that IRP coverage was not possible at the county level due to the limited number of investigative resources available to cover a wide geographic area. The Fresno sub-office, for instance, is responsible for six counties within California's Central Valley, including five state prison intake facilities, as well as numerous jails and juvenile facilities within each of the six counties. Generally, IRP resources are dedicated first to state and federal institutions, then to county facilities if staff is available. In terms of sheer numbers, however, the 520 foreign-born inmates received at the Fresno sub-office's 5 state intake sites in FY 2001 was less than 10 percent of the 6,000 plus foreign-born inmates booked into the Fresno county jail during the same period.

The Bakersfield sub-office is responsible for covering the three state prison intake facilities within its jurisdiction, as well as three Federal Correctional Institute sites, seven Community Correctional Facilities, and five Central Receiving Facilities including the Kern County Jail. Chronic vacancies at the Bakersfield sub-office were particularly alarming given that the sub-office processes the highest number of foreign-born inmates in California, averaging about 10,000 annually. As an example of the scope of the problem, in FY 2001 the Bakersfield sub-office devoted the majority of their IRP resources, about 20 positions, to interviewing nearly 6,700 foreign-born inmates that entered the 3 state intake facilities in its jurisdiction. During that same period, approximately 8,700 foreign-born inmates were booked into the Kern County Jail, the overwhelming majority of whom passed through the facility virtually undetected by the INS.

The gap between IRP resources and workload is dramatic and is not limited to California. In Dade County, Florida alone, nearly 44,000 foreign-born inmates were booked into the county jail in FY 2001, according to the Dade County Sheriff's Department. This was nearly twice the intake of foreign-born inmates in the entire California State prison system, the largest of the state IRP operations, during the same time period. Figures for

Broward County were unknown, but are believed to be significant, according to INS officials. In the Miami district office, there were 32 IA positions dedicated to IRP activities in FY 2001, only 11 of which were filled.

We interviewed INS district officials in California and Florida and asked them to provide an estimate of staffing levels needed to fully cover the IRP at federal, state, and local facilities within their respective jurisdictions. The results are shown in the table below:

<b>ANALYSIS OF ESTIMATED IRP RESOURCE NEEDS</b>					
<b>State</b>	<b>Authorized</b>	<b>On Board</b>	<b>Required</b>	<b>Percentage Authorized To Required</b>	<b>Percentage On Board To Required</b>
California	185	140	375	49%	37%
Florida	43	25	168	26%	15%
<b>TOTAL</b>	228	165	543	42%	30%

Source: INS district officials in Miami, San Diego, Los Angeles, and San Francisco

## Recruitment and Retention

Exacerbating the limited resources dedicated to IRP are the chronic vacancies existing in the immigration agent position. INS immigration agents are involved at the front end of the process, performing initial interviews and subsequent casework for IRP removals, and are the backbone of the IRP. The INS's lack of IRP coverage at state prisons in California and at counties nationwide rests in part on the recruitment and retention of INS employees assigned to IRP-related duties. The immigration agent position has suffered in recent years from high turnover and low morale, arising from it being a low-graded position with no room for advancement beyond the General Schedule (GS)-9 level, and from the tedious nature of the job itself (i.e. conducting routine interviews, on a daily basis, in a prison setting). This is not a new issue. The GAO cited high attrition rates in the immigration agent position as a concern with regard to INS's management of the IRP in their testimony before the Judiciary Committee in the House of Representatives in July 1997, Report No. GAO/T-GGD-97-154. Specifically they identified an attrition rate of 30-percent in the immigration agent position, which was significantly higher than the 11-percent average attrition rate for INS staff agency wide. We noted an average vacancy rate of 32

percent in the immigration agent position at the locations we visited. INS officials in the D&R division stated that they have studied the issue and are attempting to address it in conjunction with the INS's transition of the IRP from its Investigations division to the D&R division. Essentially, the INS's plan is to incorporate traditional immigration agent responsibilities into an enhanced detention enforcement officer (DEO) position. The new DEO position would offer more varied work experience, and provide opportunities for advancement to a second-line supervisor position at the GS-12 level.

## **Redirecting IRP Resources**

The understaffing of the IRP is made more acute by competing priorities that often deprive the program of what little staff it has. INS district directors have the discretion to redirect resources allocated to IRP activities for other activities. Particularly after the events of September 11, 2001, IRP staffing has been redirected to other duties, but even under normal circumstances the program has been susceptible to "raids" from competing priorities. We found that immigration agents assigned to the IRP were often detailed to assist with other program activities, such as employer sanctions, anti-smuggling, and fraud. While it is understandable that local management should have some discretion in managing its resources, given the enormity of the criminal alien problem and the chronic staffing shortages plaguing the IRP this reallocation of scarce resources threatens to further undermine the integrity of the program.

The crux of the problem lies in the lack of a clear program focus, part of which stems from the IRP being functionally spread over several divisions, with the bulk of the work being split between the D&R and the Investigations divisions. As a result, from the management and planning standpoint, the IRP has suffered from the lack of a program perspective, which has led to the IRP being managed in piecemeal fashion, as a collection of collateral duties, rather than as a comprehensive program. Basic information, such as the amount of money spent on the IRP was not readily available. INS officials tried to "back into" the figure by determining the number of immigration agent positions currently filled. However, the result was largely meaningless because, as previously discussed, immigration agents are often reallocated to other activities; and it did not take into account the other resources devoted to the IRP, such as investigators, detention enforcement officers, clerks, and district counsel.

A similar problem existed with the INS's Asylum program, which is dedicated to processing asylum applications. INS management addressed the problem by establishing a separate Asylum office. Implemented in 1990, the Asylum program now has its own budget for resources that are not subject to redirection by district management. In order to better protect IRP resources from reallocation, INS management should consider

establishing an IRP office separate from both the Investigations and D&R divisions, similar to what was done for the Asylum program. At the exit conference, INS officials agreed with our assessment of the problem, but disagreed with the solution, conveying their concerns that establishing the IRP as a functional island, isolated from the regular deportation process would ultimately be counterproductive. They stated that they had taken initial steps to strengthen program management, including the creation of account classification codes for the IRP in order to track IRP-related expenses.<sup>8</sup> In addition, the D&R division had created and filled an IRP Director position.

### **Federal Funds Could Be Used to Gain IRP Cooperation**

Inadequate IRP coverage can also be attributed to a lack of cooperation on the part of some state and local governments, despite the fact that they may receive substantial funding from the federal government in the form of State Criminal Alien Assistance Program (SCAAP) grants. States and counties with correctional facilities that incarcerate or detain, for 72 hours or longer, criminal aliens accused or convicted of crimes are eligible to apply for federal assistance through the SCAAP. According to the Bureau of Justice Assistance (BJA)<sup>9</sup>, which administers the program<sup>10</sup>, SCAAP funding in fiscal years 2000 and 2001 totaled \$1.1 billion. The table that follows shows the amount of SCAAP funds received by each of the sites we visited:

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<sup>8</sup> The implementation of account classification codes will allow the INS to track future IRP expenditures. It does not negate the fact that INS management was unable to provide us with comprehensive program expenditures for the period reviewed.

<sup>9</sup> SCAAP is authorized and governed by the provisions of the Omnibus Appropriations Act, Public Law 106-113, Division B, Section 1000(a); Immigration and Nationality Act 8 U.S.C. 1252, Section 242 as amended, and Title 11, Subtitle C, Section 20301 Violent Crime Control and Law Enforcement Act of 1994, Public Law 103-322.

<sup>10</sup> Under the proposed 2003 budget, SCAAP would be eliminated as a specific program, and would be consolidated along with several other grant programs into the Justice Assistance Grant Program (JAGP).

<b>SCAAP FUNDS RECEIVED</b>			
<b>Site Reviewed</b>	<b>FY 2000</b>	<b>FY 2001</b>	<b>Total</b>
State of CA	\$ 195,851,999	\$ 158,326,999	\$ 354,178,998
State of FL	26,664,699	23,090,599	49,755,298
Fresno, CA	2,221,380	2,071,339	4,292,719
Kern, CA	825,427	1,368,339	2,193,766
Broward, FL	258,442	1,914,969	2,173,411
Dade, FL	519,229	775,212	1,294,441
Total for sites visited	226,341,176	187,547,457	413,888,633
Total Nationwide	\$ 585,000,000	\$ 551,000,000	\$1,136,000,000

Source: Bureau of Justice Assistance

SCAAP grants are unconditional, requiring no reciprocation on the part of state and local governments in return for reimbursement from the federal government for the costs of incarcerating deportable criminal aliens. As such, state and local governments receive funding from SCAAP grants regardless of whether the INS gains custody of those incarcerated foreign-born inmates deemed deportable.

The State of California received over \$350 million in federal funding in FY 2000 and FY 2001 for incarcerating criminal aliens, yet we found that California has offered the INS little cooperation in streamlining the IRP process. Indeed, both the INS and the EOIR characterized California as being among the least cooperative states with regard to improving the IRP process. California currently processes foreign-born inmates in the state system at all 11 intake facilities located throughout the state in an area roughly 120,000 square miles in size. In order to ensure that all foreign-born inmates are interviewed upon entry into the system, the INS must make regular visits to each of these facilities, some of which are located hours from the nearest INS district or sub-office. While other large states, such as Texas and New York, have consolidated the number of intake facilities at which foreign-born inmates are processed, California's intake system remains a logistical challenge to local INS offices.

Although the Immigration Act of 1990 required each state receiving certain law enforcement grant funds to provide the INS with criminal history information on aliens convicted of violating state laws, there are no similar provisions in the SCAAP grants requiring the recipient's cooperation with local INS offices as a condition of receiving funds. In our judgment, SCAAP



grants should be based not only upon the incarceration of criminal aliens, but also on their removal from the country.

An argument against requiring reciprocity on the part of SCAAP recipients is that SCAAP funds represent a reimbursement of costs borne by state and local governments to incarcerate illegal aliens due to the federal government's failure to enforce its immigration laws, and therefore grant conditions would be inappropriate. However, according to INS officials we interviewed, about 30 percent of the total foreign-born state and local inmate population is legally in the United States. Applying that theory to the \$414 million of SCAAP funds received by the sites we reviewed in FY 2000 and FY 2001, roughly \$124 million represents reimbursement for the costs of incarcerating criminal aliens who entered the country legally, ~~i.e.~~ not as a result of the federal government's failure to enforce its immigration laws. We believe, and INS officials concurred, that providing SCAAP monies to state and local governments unconditionally is an opportunity lost with regard to enhancing the effectiveness of the IRP.

## **Conclusion**

The IRP's mandate requires the identification of deportable criminal aliens at federal, state, and county facilities. At the county facilities we reviewed, which processed annually from over 6,000 foreign-born inmates at the low-end, to nearly 44,000 foreign-born inmates at the high-end, we found IRP coverage to be minimal at best. INS officials acknowledged the lack of IRP coverage, which allows thousands of potentially deportable foreign-born inmates to pass through county jails undetected. We found that many foreign-born inmates not identified by the INS as potentially deportable went on to commit other crimes after being released into the community, including drug possession, spousal abuse, and child molestation. At the state level, the INS failed to interview 19 percent of foreign-born inmates entering the California state prison system in 2001. In 2002, the coverage appears to be worsening, indicating a resurgence of backlogs of foreign-born inmates requiring interviews.

The INS has not taken fundamental steps to assess: (1) the scope of the foreign-born inmate population; (2) the resources required to identify and process through the IRP all foreign-born inmates deemed deportable; and (3) the risks associated with not doing so. The INS has not been able to keep pace with the increases in IRP workload resulting from sweeping changes in immigration law enacted in 1996 that made deportable whole classes of criminal aliens previously eligible to remain in the United States. Most significantly affected by these changes was the workload at the county level. While the INS may lack the resources necessary to handle the workload, management should, at a minimum, know the resources required

to achieve full coverage and be aware of the risks associated with not achieving that goal.

The problems with the recruitment and retention of personnel in IRP positions, coupled with the reallocation of scarce resources away from the IRP, undermine the integrity of the program. Given the enormity of the foreign-born inmate population and the chronic staffing shortages plaguing the program, the INS should ensure that IRP resources are not diverted and should consider establishing a discrete IRP budget and office with dedicated positions and resources.

Finally, the full cooperation of state and local governments is essential to an effective and efficient IRP operation. To the extent that such cooperation is not forthcoming, the federal government should use whatever leverage it has to obtain that cooperation. Toward that end, we recommend that the INS propose revisions to the SCAAP grant requirements that would require, as a grant condition, the recipients' full cooperation in INS's removal efforts with regard to incarcerated criminal aliens. In our judgment, applying such conditions to these grants is appropriate and will enhance the efficiency of the IRP.

## **Recommendations**

We recommend that the INS Commissioner:

1. Determine: (a) the total foreign-born inmate population at the county level, as well as the state and federal levels; (b) the resources required to cover the population through the IRP; and (c) the risks involved in not providing full coverage.
2. Strengthen IRP program management by specifically accounting for program expenses and dedicating sufficient resources to it.
3. Fully develop and implement plans currently under consideration for an expanded detention enforcement officer position to replace the vacancy-ridden immigration agent position.
4. Request that the Office of Justice Programs implement changes to current SCAAP grant requirements that would require, as a grant condition, the full cooperation of state and local governments in INS's efforts to process and deport incarcerated criminal aliens.

## **2. THE INS INCURS MILLIONS ANNUALLY TO DETAIN CRIMINAL ALIENS DUE TO FAILURES IN THE IRP PROCESS**

The INS did not always timely process IRP cases, and as a result, was forced to detain criminal aliens released into INS custody from federal, state and county incarceration to complete deportation proceedings. In our review of 151 A-files judgmentally selected from a universe of 15,653 criminal aliens in INS custody, we identified \$1.1 million in detention costs due to failures in the IRP process within the INS's control, and \$1.2 in detention costs arising from factors beyond the INS's immediate control for a total of \$2.3 million in IRP-related detention costs. Failures in the IRP process within INS's control included (1) incomplete or inadequate casework; (2) untimely requests for travel documents; (3) failure to accommodate for delays in the hearing process; (4) failure to timely initiate and complete IRP casework; and (5) the use of inappropriate removal procedures. Factors beyond the INS's direct control, included countries that, through design or incompetence, delay the issuance of travel documents and countries that refuse to take back their citizens.

According to INS statistics, the average daily population for criminal aliens held in INS custody was over 10,000 in FY 2001, accounting for over half of the INS's available bed space. The INS indicated that the overwhelming majority of these criminal aliens were federal, state, or local inmates that were released into INS custody for removal. Under ideal conditions, an effectively operating IRP would preclude the need for INS detention in such instances. Based on this unaudited data, total IRP-related detention costs could run as high as \$200 million annually.

### **Analysis of Detention Costs**

In order to determine the causes for IRP-related detention costs, we reviewed a judgmental sample<sup>11</sup> of 151 A-files of criminal aliens released from federal, state and local correctional facilities throughout the country. In addition, we interviewed INS officials at all levels, as well as officials at the EOIR, the GAO, and the Department of State. Our review of the IRP

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<sup>11</sup> The judgmental sample was selected from a combined listing of aliens in INS custody as of July 19, 2001 and October 9, 2001. Our sample was comprised of criminal aliens, defined as all aliens legally or illegally residing in the United States who have been convicted of a crime for which they could be deported. The sample was chosen to represent a cross-section of criminal aliens in INS custody based on location, nature of crime, and nationality.

process revealed a number of causes for detention costs incurred related to the failure of the IRP to effect removal of criminal aliens upon their release from incarceration. The causes underlying the \$2.3 million in detention costs we calculated included factors both within and beyond the INS's direct control, as shown in the table below. There were also some factors over which the INS had some control but was dependent upon the cooperation of outside agencies to effect change, such as the hearing process and the timely issuance of travel documents.

<b>SUMMARY OF DETENTION COSTS FOR A-FILES REVIEWED</b>			
<b>Causes for Delays</b>	<b>Number of Instances Occurring<sup>12</sup></b>	<b>Average Days of Detention</b>	<b>Detention Costs<sup>13</sup></b>
<b>Within the INS's Control</b>			
Incomplete/Inadequate Casework	12	51	\$ 36,073
Travel Documents	66	67	260,123
The Hearing Process	85	144	716,716
Failure to Initiate IRP	10	36	20,964
Inappropriate Removal Procedure	7	153	62,893
<b>Subtotal</b>			<b>\$1,096,769</b>
<b>Beyond the INS's Direct Control</b>			
Travel Documents	21	279	\$ 342,517
Non-Repatriation Countries	28	523	858,197
<b>Subtotal</b>			<b>\$1,200,714</b>
<b>TOTAL</b>			<b>\$2,297,483</b>

<sup>12</sup> Delays in some cases were attributed to multiple causes, and as such some cases may be reflected in more than one category. However, each day of an alien's time in INS custody was attributed to only one specific cause, i.e. each detention day was counted only once.

<sup>13</sup> The total number of days was based on the date the INS took custody ("book-in") of the criminal alien, up to but not including the date of removal. If removal was not accomplished as of our fieldwork date, the fieldwork date was used as the ending date. To calculate detention cost, we used the average jail day rate of \$58.56, which was based on INS jail day rates for contract and local facilities INS-wide.

Source: A-File Review

## **Factors Within the INS's Control**

### **Incomplete/Inadequate Casework**

Our analysis of the selected A-files revealed that approximately \$36,073 of IRP-related detention costs resulted from poor file maintenance or incomplete preparation of IRP documents. D&R division officials responsible for the actual removal of criminal aliens confirmed that the organization and processing of IRP-related documents maintained in the A-files needs to be improved. Processing deficiencies included primary documents, such as photographs, fingerprints and conviction records, missing from case files. In addition, INS forms, such as the I-213, which is used to document the initial interview with the alien, were sometimes not properly authorized.

Incomplete or inadequate casework was of particular concern in the INS Western Region, where D&R officials estimated that at least 20 percent of the criminal aliens processed through the IRP had to be re-interviewed because the alien's identity was not accurately confirmed at the front-end of the process. After completing the initial interview, INS agents must perform database checks to confirm the identity of the criminal alien. However, in at least one district sub-office in California, database checks were not performed by an immigration agent, but rather were delegated to untrained personnel, who had not been involved in the initial face-to-face interview of the criminal alien. We believe this may have contributed to the breakdowns in the process. D&R division officials surmised that the untrained personnel were accepting the first alien name listed after conducting a name search on the DACS and/or CIS database systems, and as a result may not have correctly identified the criminal alien in question.

### **Travel Documents**

Delays in the receipt of travel documents<sup>14</sup> result from factors both within and beyond the INS's direct control. With regard to factors within the INS's control, we determined that the INS failed to request travel documents from countries of origin within a reasonable period of time, even when a criminal alien's removal was approved prior to the INS taking custody. For the majority of the A-files we reviewed, the INS had requested travel documents only after the criminal alien completed serving his prison sentence and had been released into INS custody. The D&R division was primarily responsible for requesting travel documents from embassies or consulates. Our review found that the criminal aliens in question were in

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<sup>14</sup> Travel documents refer to written authorization obtained from the alien's country of origin that grants the INS permission to deport the alien back to his or her native country.

INS custody an average of 67 days before the INS initiated a request for travel documents, resulting in detention costs of \$260,123. INS officials at the exit conference explained that the documentation in the A-files might not fully reflect the actions being taken by INS officers prior to submitting a request for travel documents, such as obtaining a valid passport from the alien's country of origin, and other necessary documentation. If delays in obtaining travel documents were unavoidable, then it would be incumbent upon the INS to anticipate and plan for these delays, to the extent possible, by initiating requests for travel documents prior to the alien's release into INS custody.

### **The Hearing Process**

We noted detention costs of \$716,716 resulting from failures to accommodate for the delays inherent in the hearing process. From the filing of the notice to appear with the EOIR, to the signing of the removal order by an immigration judge, the hearing process may take anywhere from two weeks to two months, or longer. Legal residents or asylum applicants, for example, would be expected to contest a removal order, and therefore a protracted hearing process would be expected. In order to avoid excessive detention time, the INS needs to anticipate such expected delays and accommodate them by bringing the EOIR into the process at the earliest date possible. INS officials in California commented that early preparation was not always possible because it was sometimes difficult for a criminal alien's attorney to get access to the inmate while serving time at the state level. The EOIR agreed that California was less than cooperative on IRP-related issues, such as prison access, relative to the other large states, such as New York and, in particular, Florida. With regard to the IRP at the state level, the relationship between the INS, the EOIR, and Florida appears to be a model practice. EOIR officials indicated that this was due in large part to the cooperative efforts of the Florida state government with regard to removing incarcerated criminal aliens. This was confirmed in our review, which found that fewer process-related delays occurred in Florida than elsewhere.

### **Failure to Timely Initiate the IRP Process**

Although the goal of the IRP is to complete necessary removal proceedings prior to the end of the criminal alien's sentence, we found that for ten of the criminal aliens in our sample, the INS failed to initiate and complete IRP casework during incarceration, resulting in \$20,964 in detention costs incurred by the INS. In some cases, IRP processing did not begin until the criminal alien was released into INS custody from federal, state or local authorities, which defeats the purpose of the program.

## **Inappropriate Removal Procedures**

Another factor affecting the timely removal of criminal aliens was the use of inappropriate removal procedures. Depending on the immigration status of the criminal alien, the type of removal proceedings may be one of the following; administrative removal, reinstatement of a prior removal order, or a hearing before an immigration judge (see Appendix II for a description of the types of removal). Both the administrative removal and reinstatement of prior removal orders are the result of streamlining efforts established under the IIRIRA, both of which allow for the expedited removal of certain criminal aliens without the need for formal hearings before an immigration judge.

We determined that in 7 of the 151 cases reviewed, the INS did not use appropriate expedited removal proceedings. For example, criminal aliens without legal status (illegal aliens), convicted of an aggravated felony and sentenced to more than a year in prison, would be subject to an administrative removal. However, we found that six illegal aliens, classified as "Entry Without Inspection," were issued a Notice to Appear (NTA), affording them the opportunity to have their removal cases presented before an immigration judge, when the aliens could have been processed for an administrative removal, thereby avoiding the formal hearing process. In addition, there was one case involving a criminal alien who should have been removed based on a prior removal order (Reinstatement), but was afforded an immigration hearing through issuance of a NTA. The additional detention costs incurred by the INS for the seven cases reviewed resulting from improper or inappropriate removal proceedings totaled \$62,893<sup>15</sup>.

## **Factors Beyond the INS's Direct Control**

In addition to factors within the INS's control, we determined detention costs resulting from factors beyond the INS's control totaling \$1,200,714 that included (1) countries that through design or incompetence delay the issuance of travel documents and (2) deportable aliens from certain countries (Cambodia, Cuba, Laos, and Vietnam) that refuse to repatriate their citizens.

### **Travel Documents**

While it is incumbent upon the INS to ensure that travel documents are requested in a timely manner, the timely issuance of travel documents

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<sup>15</sup> The additional detention cost was based on the date the INS took custody of the criminal alien up to but not including the date of removal, presuming that detention would not have been necessary if INS had utilized the appropriate expedited removal proceeding.



also depends upon the cooperation of state and local agencies on release dates. As discussed in Finding 1, there is a need to elicit greater cooperation on the part of state and local authorities with regard to the processing of deportable criminal aliens. Because the window of validity on travel documents is very brief, often not more than one day, INS officials cannot request travel documents until they know the alien's precise date of release.

Given the uncertainty of scheduled release dates, and the lack of access to timely information, INS officials usually must wait until the alien has been released into INS custody before they can request travel documents. This invariably results in the need to detain the criminal alien while waiting for the travel document request to be processed. A precise date, provided with sufficient lead-time, would significantly reduce the need for additional detention in INS custody. Again, the millions of dollars in SCAAP grants provides an opportunity for creating a more efficient IRP process by requiring greater cooperation on the part of grant recipients.

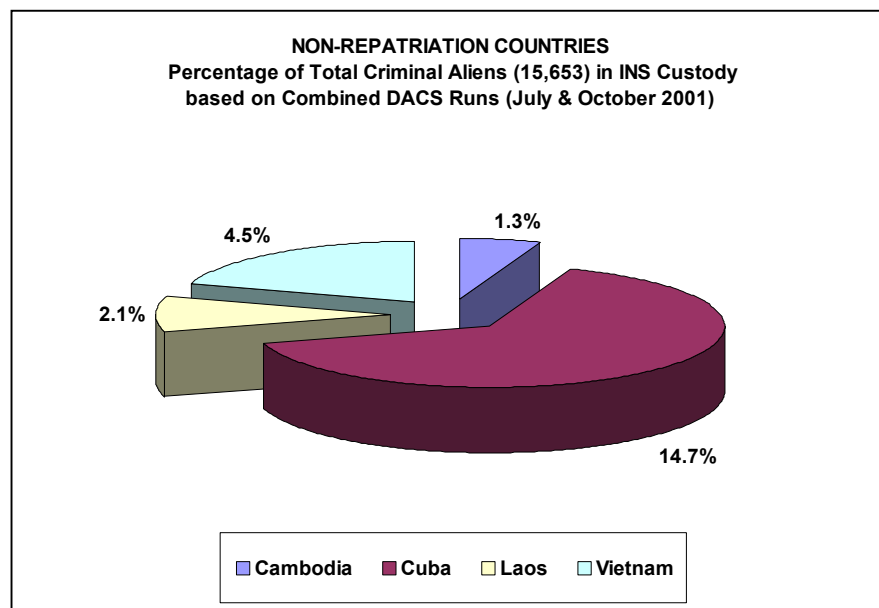
Clearly beyond the INS's control is the issue of countries that through design or incompetence delay the issuance of travel documents. In our sample, we noted 19 cases involving delays by embassies or consulates to INS requests for travel documents, resulting in \$342,517 in detention costs. INS officials stated that delays in the issuance of travel documents were common in Caribbean countries, such as Jamaica, Haiti, Guyana, and the Bahamas. Other countries identified as uncooperative in the timely issuance of travel documents included Ethiopia, Nigeria, India, and China.

Under Section 243(d) of the Immigration and Nationality Act, the Attorney General may request that the Secretary of State discontinue granting visas for countries that refuse to cooperate in the issuance of travel documents. The Department of Justice has had recent success in Guyana in obtaining the timely issuance of travel documents as a result of the provisions of Section 243(d). However, greater coordination and cooperation between the INS and the Department of State is needed to overcome the difficulties faced by the INS in dealing with foreign governments.

Currently, the INS has only informal liaisons with the Department of State concerning travel documents and other issues. INS officials have expressed an interest in establishing more formal relations with the Department of State. Specifically, INS and Department of State officials have discussed plans to detail INS personnel on a permanent basis to the Department of State in order to more effectively coordinate on immigration matters, such as, the timely removal of criminal aliens.

## Non-Repatriation Countries

A total of \$858,197, or 38 percent of the detention costs identified in our sample, were attributed to long-term detention costs incurred to detain criminal aliens from countries that refuse to take back their citizens. The United States currently has no formal arrangements with the governments of Cambodia, Cuba, Laos, and Vietnam concerning the repatriation of citizens convicted of criminal acts in the United States. The INS has had to detain indefinitely criminal aliens from these countries released into its custody. As shown in the graph below, criminal aliens from these four countries comprise just over 20 percent of the total criminal aliens in INS custody. Long-term detention for these criminal aliens is counted in years, rather than days, with some detainees going back to the early 1980's. The cost of detaining criminal aliens from these countries alone runs into millions of dollars annually.



While a recent Supreme Court decision<sup>16</sup> has alleviated, to some extent, the INS's long-term detention problem, the decision is hardly a

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<sup>16</sup> The United States Supreme Court in June 2001, in its decision (*Attorney General v. Kim Ho Ma*) held that the federal government is prohibited from detaining deportable immigrants indefinitely after they have served out their sentences, if their own countries refuse to take them back. The INS has held these ex-convicts in detention centers and local jails, sometimes for years, while trying to deport them. In its decision, the Court said such ex-convicts could not be held for more than six months if their deportation did not seem likely in the "reasonably foreseeable future" and the government failed to present compelling evidence for holding them.

solution, as these deportable criminal aliens are now being released into the community. The Attorney General has expressed an interest in bringing diplomatic pressure to bear on countries (such as the aforementioned) that refuse to accept deportation of their citizens after they are convicted of crimes in the United States. For its part the INS needs to better track and report on the impact of non-repatriation in terms of resources expended with regard to long-term detention, and in terms of public safety with regard to recidivist crimes committed by long-term criminal detainees released from INS custody as a result of the Supreme Court ruling.

## **Conclusion**

Based on our review of only 151 criminal alien A-files, we identified \$2.3 million in IRP-related detention costs which included \$1.1 million attributed to factors within the INS's direct control and \$1.2 million to factors beyond their control. While we are unable to statistically project the results of our judgmental sample, total IRP-related detention costs could run staggeringly high, as much as \$200 million annually, given that the average daily population for criminal aliens held in INS custody was over 10,000 in FY 2001, and that the INS indicated that the overwhelming majority of these criminal aliens were federal, state, or local inmates that were released into INS custody for removal. An effective IRP, under ideal conditions, would preclude the need for detention of criminal aliens released into INS custody. Conversely, an ineffective IRP creates the need for additional detention space and consumes resources that could be put to better use. The obstacles blocking the path to a fully unfettered IRP process are myriad, involving factors both within and beyond the INS's direct control. They include the failure on the part of the INS to properly train and supervise individuals performing IRP activities to ensure that the work is competent, consistent, and completed in a timely manner, and coordinate with state and local agencies, as well as federal agencies, such as the Department of State, to streamline the IRP process to the extent possible.

## **Recommendations**

We recommend that the INS Commissioner:

5. Develop and implement clear, consistent, and standardized procedures for IRP documentation and A-file organization to enhance efficiency and minimize detention costs.
6. Ensure that INS officers make use of streamlined procedures for removal as authorized under the 1996 Act to minimize detention costs.
7. Develop and implement, in coordination with the Department of State, a Memorandum of Understanding outlining the role of liaisons between the INS and the Department of State. This should include the delineation of responsibilities with respect to the timely issuance of travel documents.

## SCHEDULE OF DOLLAR-RELATED FINDINGS

FUNDS TO BETTER USE:	AMOUNT	PAGE
Detention of Deportable Criminal Aliens Released from Federal, State, and Local Correctional Facilities		
Within the INS's Control	\$1.1 Million	21
Beyond the INS's Direct Control	\$1.2 Million	21
Total	\$2.3 Million	21

**FUNDS TO BETTER USE** are defined as future funds that could be used more efficiently if management took actions to implement and complete audit recommendations.

## **STATEMENT ON COMPLIANCE WITH LAWS AND REGULATIONS**

The audit of the INS's administration of the IRP process was conducted in accordance with generally accepted government auditing standards.

As required by the standards, we tested selected transactions and records to obtain reasonable assurance about the INS's compliance with laws and regulations that, if not complied with, we believe could have a material effect on operations. Compliance with laws and regulations applicable to the IRP process is the responsibility of INS management.

An audit includes examining, on a test basis, evidence about laws and regulation. The specific requirements for which we conducted tests are contained in the United States Code, Title 8, Sections §1226, §1228, §1229a, and §1231 concerning the removal of criminal aliens.

Except for those issues discussed in the Findings and Recommendations section of this report, nothing came to our attention that causes us to believe that INS management was not in compliance with the sections of the United States Code cited above.

## **APPENDIX I**

### **AUDIT OBJECTIVES, SCOPE, AND METHODOLOGY**

#### **Audit Objectives**

The purpose of the audit was to evaluate the effectiveness of the IRP in achieving the timely removal of aliens in accordance with the laws. The objectives were to determine: (1) the effectiveness of INS's management of the IRP and, in particular, how well the INS managed the IRP with regard to the impact of the 1996 legislated changes in immigration law on the IRP workload; (2) whether the INS identified all foreign-born inmates in state or local custody, and whether deportable criminal aliens not identified by the INS went on to commit other crimes after release from incarceration; and (3) the costs incurred by the INS for the detention of criminal aliens due to failures in the IRP process and the reasons thereof.

#### **Scope**

The scope of the audit encompassed IRP activities during fiscal years 1999 through 2001. Our primary focus was on IRP activities at the state and local level, for which primary fieldwork was conducted in California and Florida and included site work at INS offices, as well as state and local correctional agencies.

#### **Methodology**

To complete the audit, we (1) reviewed applicable laws, policies, regulations, manuals, and memoranda; (2) interviewed officials at the INS, the EOIR, the GAO, and the Department of State; (3) reviewed state and county IRP operations in California and Florida, representing nearly half of the total known incarcerated foreign-born population in the United States; (4) judgmentally selected and reviewed a total of 746 case files as follows: 545 case files of inmates in state prisons and county jails in California and Florida, 151 INS A-files of criminal aliens in INS custody, and 50 INS A-files from the Western File Center in El Centro, CA; and (5) conducted fieldwork at INS Headquarters in Washington, DC; INS district and sub-offices in Los Angeles, CA; Phoenix, AZ; San Diego, CA; San Francisco, CA; Fresno CA; Bakersfield, CA; Miami, FL; the INS Western Regional Office in Laguna Niguel, CA; and the Western File Center and INS Processing Center in El Centro, CA.

For objective 1, we interviewed INS officials and analyzed data obtained from county law enforcement agencies in California and Florida to try to determine how well INS management handled the impact of the 1996 legislated changes in immigration law on the IRP workload.

For objective 2, we tested for recidivism on the part of foreign-born inmates released into the community from state and local custody. We obtained data on foreign-born inmates who were released from state and local custody in June 1999 to determine whether the INS had performed IRP interviews, and to determine whether deportable criminal aliens who were not identified had committed additional crimes after being released. We selected June 1999 in order to provide an adequate passage of time to test for recidivism.

For objective 3, we judgmentally selected 151 A-files for review from a listing of aliens detained in INS custody as of July 19, 2001 and October 9, 2001. We combined the two data runs and eliminated duplicate names and non-criminal aliens. The resulting report was analyzed for purposes of selecting a judgmental sample of A-files that would represent a cross-section of criminal aliens released into INS custody from federal, state, and local correctional facilities, based on location, nature of crime, and nationality. Calculation of detention costs was based on the number of days in detention and the average jail day rate of \$58.56, which was based on INS jail day rates for contract and local facilities INS-wide.



## APPENDIX II

### CRIMINAL ALIENS: THE REMOVAL PROCESS

The removal process involves four phases: identification and processing, case preparation, administrative proceedings, and removal. Aliens convicted of committing an aggravated felony are subject to removal. Depending on the immigration status of the criminal alien, the type of removal proceedings may be one of the following: administrative, reinstatement of a prior removal order, or a hearing before an immigration judge.

**Administrative Removal:** Under section 238(b) of the Act, no relief from removal exists once a case meets the criteria for administrative removal proceedings. Upon initiation of the proceedings, the criteria include that the individual must be an alien who is not a lawful permanent resident (LPR) and the individual must have a final conviction for an aggravated felony. When processing the alien for this procedure, each of these elements as well as the alien's identity must be established.

1. Establish alienage. An alien is any person who is not a citizen or national of the United States. In determining if a person is an alien, the INS officer (i.e. Immigration & Special Agent) must consider place of birth, the nationality of the person's parents at birth, and/or subsequent naturalization by the person or his parents. Those items that would cause an individual to be an alien must be explored during questioning. If the facts indicate that the person is an alien, they must be documented in a Record of Deportable/Inadmissible Alien (Form I-213), sworn statement, and printouts of records checks. The time and date that the alien was questioned should be noted on the Form I-213, and this evidence must be placed in the record of proceeding (ROP).
2. Verifying immigration status (not a LPR). In order to establish the alien's immigration status at the time the process begins, the alien must be interviewed and all pertinent INS records systems should be checked. All evidence collected must be placed in the ROP. The Form I-213, sworn statement, printouts of records checks, i.e. CIS, DACS, & ENFORCE systems, should be used as evidence that the alien is not a LPR. Evidence of LPR status is available both on INS automated record systems and hard copy A-files.
3. Establishing conviction of an aggravated felony. The record of conviction must be placed in the ROP. The types of documentary evidence constituting proof of conviction in immigration proceedings include the following:

- a. A record of judgment and conviction;
  - b. A record of plea, verdict and sentence;
  - c. A docket entry from court records that indicates the existence of a conviction;
  - d. Minutes of a court proceeding or a transcript of a hearing that indicates the existence of a conviction;
  - e. An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a state official associated with the state's repository of criminal justice records, that indicates the following: the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence; or
  - f. Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
4. Verifying identity. When questioning the alien and checking records and documents to determine whether the case meets the criteria for administrative removal, special care must be taken to verify his identity. The encountering officer is responsible for making absolutely certain that all information is completely consistent and there is no question whatsoever about the identity of the person or upon whom the Notice of Intent to Issue a Final Administrative Removal Order (NOI) will be served.

The law specifically requires a determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI. When the NOI is served in person, the INS officer serving the NOI verifies the identity of the person on whom it is served, and signs a statement to that effect in the Certificate of INS on the NOI.

The NOI shall set forth the preliminary determinations and inform the alien of the INS's intent to issue a Form I-851-A, Final Administrative Removal Order, without a hearing before an immigration judge. The NOI shall constitute the charging document. The NOI shall include allegations of fact and conclusions of law. It shall advise the alien has the privilege of being represented at no expense to the government by counsel of the alien's choosing, as long as counsel is authorized to practice removal proceedings; may request withholding of removal to a particular country if he or she fears persecution or torture in that country; may inspect the evidence supporting the NOI; may rebut the

charges within 10 calendar days after INS of such Notice (or 13 calendar days if Notice was by mail).

A detainer should be served on the appropriate authorities at the correctional facility after the INS officer verifies the identity and immigration status of a criminal alien amenable to removal.

Review for legal sufficiency. INS attorneys are available to provide advice regarding all aspects of cases being processed under Section 238(b) of the Act. Cases must be reviewed for legal sufficiency in accordance with outstanding instructions.

Executing final removal order of deciding INS officer: Upon the issuance of a Final Administrative Order, the INS shall issue a Warrant of Removal and be executed no sooner than 14 calendar days after the date the Final Administrative Removal Order is issued, unless the alien knowingly, voluntarily, and in writing waives the 14-day period at the time of issuance of the NOI or at any time thereafter and up to the time the alien becomes the subject of a Warrant of Removal. The warrant is served when the alien is released to the INS. The alien is taken into custody under the authority of a Warrant of Arrest issued by a deciding INS Officer (District Director, Assistant District Director for Deportation, IRP Director).

5. Determining applicability of withholding of removal. While no relief from removal is available in these proceedings, cases may arise in which removal to a particular country must be withheld under Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). However, an alien sentenced to an aggregate term of imprisonment of at least five years for his aggravated felony conviction(s) is considered to have committed a particularly serious crime and statutorily ineligible for withholding of removal. In addition, Article 3 of the CAT prohibits an alien's removal to a country where he or she is more likely than not to be tortured. There are no exceptions to this prohibition. Therefore, an alien with an aggravated felony conviction(s) may be entitled to protection under Article 3, even if he or she has been sentenced to five or more years' imprisonment.
6. Determining applicability of a waiver under Section 212(h) of the Act. An alien in administrative removal proceedings under section 238(b) of the INA is ineligible to apply for any discretionary relief. However, the Board of Immigration Appeals held that an alien not previously admitted to the United States as a LPR is statutorily eligible to seek a section 212(h) waiver despite an aggravated felony conviction. Based on this decision, a NTA must be served on the alien to begin removal

proceedings before an immigration judge (see Section on Hearings Before an immigration judge).

**Reinstatement of Final Orders:** Section 241(a)(5) of the Act provides that the Attorney General will reinstate (without referral to an immigration court) a final order against an alien who illegally reenters the United States after being deported, excluded, or removed from the United States under a final order. Before reinstating a prior order, the officer (Immigration or Special Agent) processing the case must determine:

- A. that the alien believed to have reentered illegally was previously deported or removed from the United States. The processing officer must obtain the alien's A-file or copies of the documents contained therein to verify that the alien was subject to a final order and that the previous order was executed.
- B. that the alien believed to have reentered illegally is the same alien as the one previously removed. If, in questioning an alien, he or she admits to being previously deported or removed, the Form I-213 and the sworn statement must so indicate. If a record check or fingerprint hit reveals such prior adverse action, that information must be included in the INS file. The alien should be questioned and confronted with any relevant adverse information from the A-file, record check or fingerprint hit, and such information must be included in the I-213 and sworn statement, if applicable.

If the alien disputes the fact that he or she was previously removed, a comparison of the alien's fingerprints with those in the A-file documenting the previous removal must be completed to document positively the alien's identity. The Forensic Document Laboratory via photo phone or a locally available expert must complete the fingerprint comparison.

- C. that the alien did in fact illegally reenter the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include check of INS data systems available to the officer.

In any case in which the officer is not able to satisfactorily establish the preceding facts, the previous order cannot be reinstated, and the alien must be processed for removal through

other applicable proceedings, such as administrative removal under section 238 of the Act, or removal proceedings before an immigration judge under section 240 of the Act.

In all cases in which an order may be reinstated, the officer must create a record of sworn statement. The record of sworn statement will document admissions, if any, relevant to determining whether the alien is subject to reinstatement, and whether the alien expressed a fear of persecution or torture if returned on the reinstated order.

In addition to covering the normal elements (identity, alienage, and the required elements listed above), the sworn statement must include the following question and the alien's response thereto: "Do you have any fear of persecution or torture should you be removed from the United States?" If the alien refuses to provide a sworn statement, the record should so indicate. An alien's refusal to execute a sworn statement does not preclude the INS from reinstating a prior order, provided that the record establishes that all of the required elements discussed in the above paragraphs have been satisfied. If the alien refuses to give a sworn statement, the processing officer must record whatever information the alien orally provided that relates to reinstatement of the order or to any claim of possible persecution.

Once the processing officer is satisfied that the alien has been clearly identified and is subject to the reinstatement provision (and the sworn statement has been taken), the officer shall prepare Form I-871, Notice of Intent/Decision to Reinstate Prior Order. The processing officer completes and signs the top portion of the form, provides a copy to the alien, and retains a copy for the file. The officer must read, or have read the notice to the alien in a language the alien understands. The alien signs the second box of the file copy and indicates whether he intends to rebut the officer's determination. In the event that the alien declines to sign the form, the officer shall note the block that a copy of the form was provided, but that the alien declined to acknowledge receipt or provide any response. If the alien provides a response, the officer shall review the information provided and promptly determine whether reevaluation of the decision or further investigation is warranted. In not, or if no

additional information is provided, the officer shall proceed with reinstatement based on the information already available.

Review for legal sufficiency. INS attorneys are available to provide advice regarding all aspects of cases being processed under Section 241a of the Act. Cases must be reviewed for legal sufficiency in accordance with outstanding instructions.

If, after considering the alien's response the processing officer is satisfied that the alien's prior order should be reinstated, the processing officer presents the Form I-871 and all relevant evidence to a deciding officer for review and signature at the bottom of the form. A deciding officer is any officer authorized to issue a Notice to Appear, i.e. District Directors, Assistant District Director for Investigations, Officers-In-Charge, IHP Directors.

After the deciding officer signs the Form I-871 reinstating the prior order, the INS shall issue a new Warrant of Removal, Form I-205, in accordance with 8 CFR 241.2. The officer should indicate on the I-205 in the section reserved for provisions of law that removal is pursuant to section 241(a)(5) of the Act as amended by the IIRIRA.

At the time of removal, the officer executing the reinstated final order must photograph the alien and obtain a classifiable rolled print of the alien's right index finger on the I-205. The alien and the officer taking the print must sign in the spaces provided. Once the final order has been executed, it must be attached to a copy of the previously executed documents, which establish the prior departure or removal. The officer executing the reinstated order must also serve the alien with a notice of penalties on Form I-294. The penalty period commences on the date the reinstated order is executed. Since this is his or her second (or subsequent) removal, the alien is subject to the 20-year bar, unless the alien is also an aggravated felon, in which case the lifetime bar applies. The officer should route the I-205 and a copy of the I-294 to the A-file. A comparison of the photographs and fingerprints between the original I-205 and the second I-205 executed at the time of reinstatement may prove essential in the event the reinstatement order is questioned at a later date.

**Removal Hearing before an immigration judge (Section 240 of the Act):** There are three circumstances whereby a removal hearing may be initiated before an immigration judge:

(1) If a Deciding INS Officer (District Directors, Assistant District Director for Investigations, IRP Director) finds that the record of proceeding, including the alien's timely rebuttal, raises a genuine issue of material fact regarding the preliminary findings of an alien who initially has been processed as an administrative removal, the deciding officer may issue a notice to appear to initiate removal proceeding under section 240 of the Act.

(2) In general, all legal permanent residents are given the opportunity to present their case before an immigration judge.

(3) Aliens who have entered without inspection (EWI) (section 212 of the Act) are entitled to a removal hearing before an immigration judge.<sup>17</sup> To initiate a hearing before an immigration judge, written notice, referred to as a Notice to Appear (NTA) (I-862), is either given to the alien in person or by mail if personal INS is not practicable.

The NTA will specify the following: the nature of the proceedings against the criminal alien, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of law, the charges against the alien, and the statutory provisions alleged to have been violated. No hearing date may be scheduled earlier than ten days from the date of INS of the NTA (to allow sufficient time to obtain counsel and prepare for the hearing). The NTA includes a waiver, which the alien may execute in order to obtain an earlier hearing date.

Prior to serving the NTA to an alien, the following steps must be taken in each case referred to an immigration judge for a removal hearing:

1. Search for existing INS records in CIS, DACS, or other appropriate automated systems. If an A-file exists, create a temporary file. If a file does not exist, follow local district procedures for creating an A-file.
2. Complete Form I-213, Record of Inadmissible Alien.
3. Complete Form I-826.

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<sup>17</sup> If the subject entered without inspection and was convicted of burglary, robbery, theft, or a crime of violence, with a sentence of less than a year a Notice to Appear (I-862) must be issued. If the sentence is over a year then a Notice of Intent to issue an Administrative Removal (I-851) should be issued.

4. Complete applicable sections of Form I-214.
5. Provide photograph and fingerprints (2 sets) of the alien.
6. Review the A-file to ensure that necessary court records or other evidence needed for the hearing are available.

The INS Legal Division prepares a Transmittal Memorandum for filing the NTA with the EOIR. The EOIR receives the transmittal memorandum and schedules the case received on the Master Calendar. The hearings are scheduled based on the institutional hearing site where the alien is incarcerated. The hearings are scheduled from 30 to 60 days from the receipt of the Transmittal Memorandum, depending on each site's hearing schedule. The EOIR sends copies of the Master Calendar to the Legal Division at the District Office. The Legal Division send notices of the hearing date to the alien respondent and/or their attorney. The Master Calendar hearing is held, and the alien respondent is advised by the immigration judge of the removal charges, the respondent's rights in a removal proceeding, and called upon to enter a plea. If, at the conclusion of the proceeding, the alien is found removable and a final order of removal is issued by the immigration judge, the A-File is forwarded by the Legal Assistant of the Detention and Removals Operations for removal processing following the completion of the criminal sentence to incarceration.

For a majority of removal hearings, more than one hearing may occur. The respondent may contest removal and request additional time to prepare a defense or secure representation. If the respondent contests removal, seeks representation, or is granted a continuance for other reasons, another hearing will be scheduled. A time period that may span from 30 to 60 days elapses between hearings whether they are Master Calendar hearings, subsequent Merit hearings, or Continuances.



## APPENDIX III

### ANALYSIS OF PRE AND POST IMMIGRATION LAWS

#### Expansion of the terms of Deportable Offense

Pre 1996 (8 & 1251 pg 163)	Post 1996
<p>(A) General crimes</p> <p>(i) Crimes of moral turpitude Any alien who—</p> <p>(I) is convicted of a crime involving moral turpitude committed within five years after the date of entry, and</p> <p>(II) either is sentenced to confinement or is confined therefore in a prison or correctional institution for one year or longer, is deportable.</p>	<p>(B) General crimes</p> <p>(i) Crimes of moral turpitude Any alien who—</p> <p>(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255 (j) of this title) after the date of admission,</p> <p>(II) is convicted of a crime for which sentence of one year or longer may be imposed is deportable.</p>
<p>(ii) Multiple crime convictions</p> <p>Any alien who at any time after entry convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.</p>	<p>(Same as the pre-1996 wording except in the first sentence the word admission is substituted for entry.)</p>
<p>(iii) Aggravated felony</p> <p>Any alien who at any time after entry convicted of an aggravated Felony at any time after entry is deportable.</p>	<p>No change</p>
<p>(iv) Waiver authorized</p> <p>Clauses (I), (ii), and (iii) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and conditional pardon by the President of the United States or by the Governor of any of the several States.</p>	<p>(Waiver authorized is re-designated as (iv). The new (iv) is designated high-speed flight: Any alien who is convicted of a violation of section 758 Title 18 (relating to high-speed flight from an immigration checkpoint) is deportable (the wording for Waiver authorized is unchanged except for Inclusion of iv).</p>

Pre 1996	Post 1996
<p>(B) Controlled substances</p> <p>(i) Conviction</p> <p>Any alien who at any time after entry has been convicted of a violation of (or a conspiracy) or attempt to violate any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21 other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable).</p>	<p>Only change is the substitution of the word "entry" in place of "admission" in the first sentence.</p>
<p>(ii) Drug abusers and addicts</p> <p>Any aliens who is, or at any time after entrance has been, a drug abuser or an addict is deportable.</p>	<p>No change.</p>
<p>(C) Certain firearms offenses</p> <p>Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying in violation of any law, any weapon, part or accessory which is a firearm or destructive devise (as defined in section 921(a) of Title 18) is deportable.</p>	<p>Any alien who at anytime after admission is convicted under any law of purchasing, selling offering for sale exchanging, using owning, possessing or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange use, own, posses, or carry, any weapon, part or accessory which is a firearm or destructive device (as defined in section 921 (a) of Title 18) in violation of any law is deportable.</p>
<p>(D) Miscellaneous crimes</p> <p>Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy to violate-</p> <p>(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18, for which a term of imprisonment of five or more years may be imposed;</p> <p>(ii) any offense under section 871 or 960 of Title 18</p> <p>(iii) a violation of any provision of the Military selective INS Act (50 U.S.C App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App 1 et seq.); or</p>	<p>No change</p>

(iv) a violation of section 1185 or 1328 of this title is deportable.		
(E) Crimes of domestic, violence, stalking or violation of protection order, crimes against children, and		
Not in pre-1996 law	(i) Domestic violence, stalking, and child abuse  Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crimes of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal Government, or unit of local government.	
	(ii) Violators of protection orders  Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or the persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final order issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.	

Additional crimes designated as aggravated felony:

Prior to 1996 the number of crimes to be determined as aggravated felony (8 & 1101 (43)) was limited. The term "aggravated felony" refers to crimes of murder, any illicit trafficking in any controlled substance...including any drug trafficking crime, or any illicit trafficking in any firearms or destructive devices...relating to laundering of monetary instruments...or any crime of violence...for which the term of imprisonment imposed...is at least 5 years, or any conspiracy to commit any such act."

After 1996 the term aggravated felony embraced the following (concepts are paraphrased for clarity.) Those with an \* contain an element of those crimes considered aggravated prior to 1996. None of the pre-1996 aggravated felonies ceased to be aggravated after 1996.

- \*(A) Murder, rape, or sexual abuse of a minor
- \*(B) Illicit trafficking of controlled substance
- \*(C) Illicit trafficking in firearms or destructive devices
- \*(D) Laundering of monetary instruments
- (E) Activity regarding exploding devices and firearms
- \*(F) Crimes of violence with a prison sentence of at least one year
- (G) A theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year
- (H) Crimes regarding ransom
- (I) Crimes regarding child pornography
- (J) Crimes regarding racketeer influenced corrupt organizations or gambling for which a sentence of one year imprisonment or more may be imposed
- (K) Offenses that relate (i) to the owning, controlling, managing or supervising of a prostitution business (ii) transportation for the purpose of prostitution (iii) maintaining persons in peonage, slavery or involuntary servitude
- (L) Crimes relating to (i) gathering or transmitting national defense information (ii) relating to undercover intelligence (iii) protecting the identity of undercover agents
- (M) Crimes of fraud which (i) results in a loss to the victim of \$10,000 or more or (ii) results in a loss of \$10,000 or more to the government
- (N) Offense related to alien smuggling, except the case of a first offense where the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual)
- (O) Offense who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph
- (P) Offense (i) which is falsely making, forging, counterfeiting, mutilating, or altering a passport, (ii) the term of imprisonment is at least 12 months, except for first offense, where the offense was for the purpose of assisting, abetting and aiding only the alien's spouse child or parent (and no other individual)
- (Q) Failure to appear by a defendant for the INS of a sentence of an offense punishable by the imprisonment for a term of 5 years or more
- (R) Commercial bribery, counterfeiting, forgery, or trafficking in vehicle identification numbers for which the term of imprisonment is one year or more.
- (S) Obstruction of justice, perjury, subornation of perjury, or bribery of a witness where imprisonment is one year or more.
- (T) Failure to appear before a court to answer to or depose of a charge of a felony for which a sentence of 2 years imprisonment or more may be imposed.
- (U) An attempt or conspiracy to commit an offense described in this paragraph.

Auditor's Notes: While there have been changes in many areas, the change in application of the moral turpitude clause has the most potential in expanding the number of deportable aliens from pre 1996 to post 1996. The key is prior to 1996 the moral turpitude crime had to have a sentence of one year or more. Post 1996 required only that the crime have a potential prison term of one year or more. Whether the alien was given an actual sentence or served an actual sentence is no longer required. Domestic violence clause may also have expanded the potential caseload. The number of crimes categorized as aggravated felonies increased from 5 to 21. Equally significant is the waiver of the 5-year minimum sentence. Under the 1996 law only 7 (Crimes F, G, J, Q, R, T,) of the 21 had any time constraints and only 2 (Q and T) of the 7 had sentence minimums greater than 1 year. The result is the potential number of IRP candidates at the local level is greater than prior to 1996.

## APPENDIX IV



U.S. Department of Justice  
Immigration and Naturalization Service

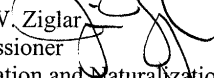
HQOIA 110/8.2-C

Office of the Commissioner

425 I Street NW  
Washington, DC 20536

SEP 20 2002

MEMORANDUM FOR GUY K. ZIMMERMAN  
ASSISTANT INSPECTOR GENERAL FOR AUDIT  
DEPARTMENT OF JUSTICE

FROM: James W. Ziglar   
Commissioner  
Immigration and Naturalization Service

SUBJECT: Draft Audit Report - Immigration and Naturalization Service  
Institutional Removal Program

I appreciate the opportunity to comment on the subject draft report and solicited input from the senior management official who is most significantly impacted -- the Executive Associate Commissioner for Field Operations. I reviewed the response and concur with the corrective actions planned. The response is attached for your review.

If you have any questions, please contact Kathleen Stanley, Audit Liaison, at (202) 514-8800.

Attachment

cc: Vickie L. Sloan, DOJ Audit Liaison



U.S. Department of Justice  
Immigration and Naturalization Service

HQOPS 110/8.2-C

Office of the Executive Associate Commissioner

425 I Street NW  
Washington, DC 20536

SEP 16 2002

MEMORANDUM FOR THE COMMISSIONER

FROM: Johnny N. Williams  
Executive Associate Commissioner  
Office of Field Operations

SUBJECT: Draft Audit Report: Immigration and Naturalization Service (INS)  
Institutional Removal Program (IRP)

In the spring of 2001, the Office of the Inspector General (OIG) began an audit of the IRP. This audit, conducted by the San Francisco office of the OIG, was a follow-up audit of previous OIG and General Accounting Office (GAO) reviews. On August 7, 2002, the OIG sent the seven recommendations from their draft report to the INS for comment. Below are the recommendations and INS' response that will be included in the final report. Please note that a plan to transition the IRP from Investigations to Detention and Removal is in the final stages of development.

**RECOMMENDATION 1:** Determine: (a) the total foreign-born inmate population at the county level, as well as the state and federal levels; (b) the resources required to cover the population through the IRP; and (c) the risks involved in not providing full coverage.

**INS RESPONSE: Concur.** The INS agrees that we must ascertain an accurate accounting of the foreign-born population at all levels (federal, county & state), to establish resource requirements. A partial resource review was conducted of the current program to ascertain immediate needs, however, a complete accounting will begin in fiscal year 2003 to determine the total amount of resources required to address these populations.

**RECOMMENDATION 2:** Strengthen the IRP program by specifically accounting for program expenses and dedicating sufficient resources to it.

**INS RESPONSE: Concur.** The INS agrees with the need for strengthened management oversight and accounting of program expenses. HQDRO has created a funding element within the DRO funding classification that will appropriately provide necessary funding and tracking of expenses needed for the IRP program. INS will continue to request the resources to support IRP through the budget process.

**RECOMMENDATION 3:** Fully develop and implement plans currently under consideration for an expanded detention enforcement officer position to replace the vacancy-ridden immigration agent position.

**INS RESPONSE: Concur.** The INS agrees that a plan to expand the Detention Enforcement Officer positions is needed. This multi-year plan has already been developed and is currently being reviewed. Funding is available for the first two years. However, funding for the out years has not been identified.

**RECOMMENDATION 4:** Request that the Office of Justice Programs implement changes to current SCAAP grant requirements that would require, as a grant condition, the full cooperation of state and local governments in INS' efforts to process and deport incarcerated criminal aliens.

**INS RESPONSE: Concur.** The INS agrees with changing the provisions of SCAPP to include full cooperation in INS' efforts. However, funding for this initiative has not been included in the President's Fiscal Year 2003 budget request in favor of higher priority initiatives.

**RECOMMENDATION 5:** Develop and implement clear, consistent, and standardized procedures for IRP documentation and A-file organization to enhance efficiency and minimize detention costs.

**INS RESPONSE: Concur.** The INS agrees that IRP procedures for file documentation must be clear and consistent. INS will develop an operation manual and the appropriate training to address this area.

**RECOMMENDATION 6:** Ensure that INS officers make use of streamlined procedures for removal as authorized under the 1996 Act to minimize detention costs.

**INS RESPONSE: Concur.** The INS agrees that INS officers use streamlined removal procedures as authorized under the 1996 Act. This will also be included in the operation manual and training referenced above.

**RECOMMENDATION 7:** Develop and implement, in coordination with the Department of State, a Memorandum of Understanding outlining the role of liaisons between the INS and the Department of State. This should include the delineation of responsibilities with respect to the timely issuance of travel documents.

**INS RESPONSE: Concur.** The INS agrees that there is a need for the INS and Department of State to synchronize our efforts with respect to the issuance of travel documents. INS has already initiated these efforts by placing a liaison officer in the State Department in June of this year. This officer acts to coordinate travel document efforts between the State Department and our removals division. Our officer will coordinate the MOU.

Please contact Richard Chandler, Special Assistant, in the Office of Detention and Removal if you have any questions or concerns with this OIG Inspection. He may be reached on (202) 305-0725.



## APPENDIX V

### ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE REPORT

The INS response to the audit (Appendix IV) describes the actions taken or planned to implement our recommendations. This appendix summarizes our response and the actions necessary to close the report.

Recommendation Number:

1. **Resolved.** In its response the INS stated that it had conducted a partial resource review and that a complete review of resource requirements will begin in fiscal year 2003. In order to close this recommendation, please provide to the OIG the results of the review including total estimated incarcerated foreign-born populations, the resources required to fully address those populations, and the associated risks in not fulfilling total resource requirements.
2. **Resolved.** In its response the INS stated that it had created a funding element within the Detention & Removal Office's funding classification that will provide for the funding and tracking of resources expended for the IRP. In order to close this recommendation, please provide to the OIG the account classification codes established for tracking IRP funding and expenses.
3. **Resolved.** In its response the INS stated that it had developed and is preparing to implement a multi-year plan to provide an expanded DEO position to staff the IRP. In order to close this recommendation, please provide to the OIG the plans for implementation, including the revised DEO position description, the number of positions to be dedicated to the IRP, and the estimated time frame for full implementation.
4. **Resolved.** In its response the INS stated that it agreed with the recommendation, but indicated that it would not pursue changes to SCAAP provisions given that the funding for the initiative had not been included in the President's Fiscal Year 2003 budget request. The OIG is aware of the status of SCAAP funding in the President's budget request. The recommendation will remain open pending Congressional approval of the FY 2003 budget.

5. **Resolved.** In its response the INS stated that it would develop an operations manual and provide appropriate training to address problems concerning the consistency and quality of IRP casework. In order to close this recommendation, please provide to the OIG a copy of the operations manual and training syllabus.
6. **Resolved.** In its response the INS stated that it would address the use of streamlined procedures for removal in its operations manual and training regimen. In order to close this recommendation, please provide to the OIG a copy of the operations manual and training syllabus.
7. **Resolved.** In its response the INS stated that it placed a liaison officer in the State Department and that the officer would coordinate the MOU. In order to close this recommendation, please provide to the OIG a signed copy of the MOU.